

**CERTIFIED FOR PARTIAL PUBLICATION\***  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**  
**DIVISION TWO**

CUMBRE, INC. et al.,

Plaintiffs and Appellants,

v.

STATE COMPENSATION INSURANCE  
FUND,

Defendant and Respondent.

E048799

(Super.Ct.No. RCVRS073523)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,  
Judge. Affirmed.

Nossaman LLP, James C. Powers, K. Erik Friess, and David J. Farkas for  
Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Andre J. Cronthall, Whitney Jones Roy,  
and Alison N. Kleaver for Defendant and Respondent.

Cumbre, Inc. and Coachella Valley Insurance Service, Inc. (Cumbre) acted as  
preferred brokers for the State Compensation Insurance Fund (SCIF) until 2003, when

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion  
is certified for publication with the exception of parts 1, 3, 4, 5, and 6.

the Department of Insurance pressured SCIF to terminate unprofitable brokers. Because Cumbre's loss ratio was consistently over 80 percent over a three-year period, its contract was terminated. Although SCIF gave brokers an opportunity to appeal the decision, Cumbre was unsuccessful in securing reinstatement because it would have had to exclude a substantial portion of its book of business to bring its loss ratio down to 80 percent. Cumbre sued for damages under several theories. In 2005, the trial court sustained a demurrer to the breach of contract cause of action without leave to amend, and granted SCIF's motion for summary judgment as to the common law cause of action for violation of fair procedure, and the cause of action for unfair competition.

In a prior opinion, we affirmed the trial court's order sustaining the demurrer, but reversed the summary judgment on the ground that there was a triable issue of fact. (*Cumbre, Inc. v. State Compensation Insurance Fund* (May 14, 2007, E040219) [nonpub. opn.].) On remand, the matter went to trial and a jury returned verdicts in favor of SCIF on all causes of action. Cumbre now appeals that judgment.

## BACKGROUND

Cumbre, including its wholly owned subsidiary Coachella Valley Insurance Service, Inc., is an insurance brokerage focusing on workers' compensation insurance. The SCIF is a public enterprise fund and a state agency under the Department of Industrial Relations. (Ins. Code, § 11773; Lab. Code, § 56.) SCIF provides employers with workers' compensation insurance, operating as a self-supporting business. (Ins. Code, § 11775.) SCIF was required to provide a market for employers who needed workers' compensation insurance. SCIF was a direct writer of insurance for most of its

existence, but began working with brokers in 1993. In 1995, Cumbre applied for and obtained certification to submit business as a broker for SCIF.

Brokerage contracts with SCIF were one-year agreements, with commissions paid monthly. The standard contract, in effect in 2003, included a provision permitting SCIF to modify commissions in its discretion, and that it would remain in effect until December 31, 2003, unless revised, suspended or terminated before that date. The agreement further set out the commissions to be paid and provided it was terminable by either party after not less than sixty days' prior written notice, among other things. Brokers, like Cumbre, whose premium volume met certain criteria, were also eligible for override commissions, as "preferred brokers," based on volume, retention, and quality.

Between 1999 and 2003, there was significant increase in loss costs for workers' compensation benefits affecting all carriers who wrote insurance in California, causing many insurers to go bankrupt or be liquidated. This had an adverse impact on SCIF's financial condition, because, as the insurer of last resort, it was required by law to provide insurance to any employer requesting workers' compensation insurance.

Because the amount of business written between 2000 and 2002 grew more than the amount of surplus available to pay claims, SCIF was deemed to have reached "regulatory action level," requiring SCIF to submit a risk-based capital plan to the Department of Insurance to reduce the amount of business it wrote and to increase the surplus. In 2002, officers of SCIF met with the Department of Insurance to discuss various ways to reduce the loss ratios, which were below industry levels. Among several other components of the risk-based capital plan, SCIF was urged to terminate agents

producing unprofitable business. Unprofitability was determined to mean that the broker exceeded an 80 percent loss ratio for the preceding three-year period. “Loss ratio” refers to the difference between the amount incurred to cover losses in claims compared with the amount of premium earned. The criteria for the broker termination program also included a \$175,000 stop loss per claim and the accumulated account size had to be greater than \$500,000 for the three-year period of 1999, 2000, and 2001.

Between 2002 and 2003, SCIF’s financial problems got worse. By December 2002, SCIF had reached the mandatory control level according to the Department of Insurance guidelines. This level is the most severe level, at which the Department of Insurance has authority to take control over a company and replace management. In January 2003, SCIF was informed by the Insurance Commissioner that SCIF needed to continue to work on its inadequate capital position and was asked to take action to improve its financial position and develop a plan to address those issues. SCIF drafted the Risk Based Capital Plan the following month, to increase capital through additional retained earnings, increasing premium rates and reducing commissions to brokers. The Department of Insurance now required SCIF to escalate the broker termination program, and made further demands.

After reviewing broker records for the preceding three-year period, it was determined that Cumbre met the unprofitable broker criteria, and, in April 2003, SCIF notified Cumbre that its brokerage agreement would be terminated, effective in August 2003. The notice informed Cumbre that it could appeal the termination and seek reinstatement. Cumbre did so, pointing out to SCIF that the calculation of the loss ratio

failed to include some policies that met the criteria, included policies that should have been excluded, as well as accounts that were no longer clients.

Using revised criteria, Cumbre argued its loss ratio was just under 80 percent. Unfortunately, to reach Cumbre's calculation, a substantial percentage of its book of business would have to be disregarded (approximately 20 percent), and even so, Cumbre's loss ratio was consistently higher than most other brokers. Additionally, the loss ratio was only one of five criteria that compelled Cumbre's termination under the program, where other brokers only had two or three factors working against them. Even after correcting the loss ratio to account for a math error, bringing the loss ratio down to 79.55 percent, SCIF's opinion about the profitability of Cumbre was unchanged. To insure fairness, SCIF reviewed Cumbre's appeal twice.

Cumbre's appeal was therefore unsuccessful. Notwithstanding the broker termination program, SCIF continued to pay commissions for the book of business Cumbre brought in even after August 2003, and permitted Cumbre to submit policy renewals to SCIF. Cumbre claimed it lost \$300,000 for its 2003 preferred broker commissions, and its business valuation expert estimated that Cumbre lost \$18,652,835 as a result of the loss of its workers' compensation business, \$28,017,204 for the loss of other lines of business, for total lost profits of \$46,670,039.<sup>1</sup>

The defense experts disputed this estimate, pointing out that the brokerage contract gave SCIF the right to terminate at any time upon 60 days' notice, so any damage

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<sup>1</sup> The reporter's transcript indicates a sum of \$46,670.39, but this appears to be a typographical error.

estimate was based on a speculative assumption. It also ignored the effect of Insurance Code section 769 which provides policyholders with continued coverage and representation by a broker, allowing Cumbre to continue to place its clients' business with SCIF for up to a year after termination.

Further, SCIF's expert noted that two-thirds of Cumbre's damage claim related to lines of business other than workers' compensation insurance. Cumbre's long-term damage estimates did not take into account the fluctuations of the stock market, or the fact that Cumbre could place its workers' compensation business with other carriers, maintaining its broker relationships with employers, and erroneously assumed that some employers would remain insured by SCIF indefinitely, where the actual analysis showed that out of 388 policies, 136 would be lost for nonpayment of premiums, cancellation for noncompliance with policy terms, or other reasons having nothing to do with the broker termination program. And, contrary to Cumbre's assertion that it was damaged, its income increased from \$3.5 million in 2001, to \$4.2 million after the termination of the brokerage contract.

In July 2003, Cumbre filed a complaint seeking injunctive relief and damages arising from the termination of its brokerage agreement with SCIF. In March 2004, SCIF offered reinstatement to all terminated brokers, effective in 2004. The offer of reinstatement provided that brokerages engaged in litigation arising out of the broker termination program were ineligible for reinstatement. Because Cumbre had instituted legal action, it did not seek reinstatement.

The fifth amended complaint was filed in 2005. It alleged causes of action for violation of the duty of fair procedure, interference with prospective economic advantage, and unfair competition (Bus. & Prof. Code, §§ 17200 et seq.).<sup>2</sup> On December 15, 2005, upon cross-motions for summary adjudication and summary judgment, the trial court issued a statement of decision denying Cumbre's motion and granting SCIF's motion for summary judgment. This judgment was appealed in *Cumbre, Inc. v. State Compensation Insurance Fund*, *supra*, E040219, where we affirmed the orders sustaining the demurrers but reversed the summary judgment on the ground there were triable issues of fact.

Following the remittitur, the matter proceeded to trial by jury on the remaining causes of action. On March 6, 2009, the jury returned special verdicts finding: (1) the termination of Cumbre's broker status had a significant effect on its substantial economic interest; (2) SCIF's creation of the broker termination program was substantively rational; (3) SCIF's decision to terminate Cumbre's broker status was substantively rational; and (4) SCIF provided Cumbre with adequate notice of the reasons for termination of its broker status and a reasonable opportunity to respond. Judgment in favor of SCIF was filed on June 5, 2009, from which Cumbre appeals.

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<sup>2</sup> Causes of action for breach of contract and violation of civil rights (42 U.S.C. § 1983) were dismissed by way of an order sustaining demurrers to those claims, which were affirmed in a prior appeal in this matter. (*Cumbre, Inc. v. State Compensation Insurance Fund*, *supra*, E040219.)

## DISCUSSION

### 1. There Is Substantial Evidence to Support the Judgment on the Common Law Claim for Violation of Fair Procedure.

Cumbre argues that the undisputed facts prove that SCIF's termination process was procedurally unfair, challenging the sufficiency of the evidence to support the jury's verdict. We disagree.

#### a. Standard of Review

“A judgment or order of the lower court is *presumed correct*.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [italics in original].) We must consider the evidence in the light most favorable to the prevailing party, giving such party the benefit of every reasonable inference, and resolving all conflicts in support of the judgment. (*Gooch v. Hendrix* (1993) 5 Cal.4th 266, 279.) All intendments and presumptions are indulged to support the judgment on matters as to which the record is silent, and error must be affirmatively shown. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 59, quoting *Denham, supra*.) When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court or jury. (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 117.) The resolution of any conflict in witnesses' testimony is for the jury. (*Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 975.)

b. Discussion

In making its argument, Cumbre focuses on the procedures established by SCIF to appeal from the decision to terminate a broker. Cumbre asserts SCIF's failure to give the criteria used to determine which policies to exclude in determining loss ratio, and any termination based on the percentage of book of business removed in calculating that loss ratio, violated fair procedure. The record shows that SCIF gave adequate notice of the information needed to assist brokers in making their appeals.

The common law doctrine of fair procedure protects, in certain situations, against arbitrary decisions by private organizations. (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066.) When the right of fair procedure applies, the decision-making must be both substantively rational and procedurally fair. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 (*Pinsker II*); see also *Kim v. Southern Sierra Council Boy Scouts of America* (2004) 117 Cal.App.4th 743, 746-747.) To be fair, the procedure must afford the adversely affected party some meaningful opportunity to be heard in his defense, but does not compel formal proceedings with all the embellishments of a court trial, nor adherence to a single mode of process. (*Pinsker II, supra*, at p. 555.) It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. (*Ibid.*)

Cumbre has not cited any authority to support its contention that SCIF was required to inform terminated brokers what policies to exclude in determining loss ratio in the appeal. However, it appears from the evidence adduced at trial that SCIF considered multiple alternative calculations of Cumbre's loss ratio, at Cumbre's request,

based on the exclusion or inclusion of various policies, until Cumbre found a formula that would bring its loss ratio down to just less than 80 percent. This was not persuasive because it required SCIF to ignore 20 percent of Cumbre's book of business, and did not take into account the other criteria considered in making the decision to terminate Cumbre. To insure fairness, SCIF reviewed Cumbre's appeal twice.

The notice informed terminated brokers that the appeal "should clearly outline your reasons why this action should be rescinded . . . ." Considering that Cumbre was able to provide a 56-page binder of data in support of its appeal, the notice provided Cumbre with a fair opportunity to present its position.

Cumbre argues that if its appeal was denied on the basis of minor calculations, fair procedure was violated. There is nothing in the record to support an inference that Cumbre's appeal was denied on the basis of minor calculations.

Cumbre also argues that fair procedure prohibits termination based on vague, undefined concepts such as "unprofitable." Cumbre never sought a clarification or definition of the term in the trial court so that objection was forfeited. (*Farmer Bros. Co. v. Franchise Tax Bd.* (2003) 108 Cal.App.4th 976, 993 [a party on appeal cannot successfully complain because the trial court failed to do something it was not asked to do].) Finally, Cumbre argues that (1) SCIF violated fair procedure by failing to provide Cumbre with the evidence relied on by SCIF in denying the appeal, (2) it conducted proceedings in secret, and (3) it did not give Cumbre the opportunity to contest the "charges" against it. The record shows that the notice of termination informed Cumbre that the decision was based on the fact that the brokerage had a three-year combined

average loss ratio in excess of 80 percent for the 1999, 2000, and 2001 policy years, and that a loss limitation of \$175,000 per occurrence was applied to the total incurred losses in the determination of the loss ratio. This adequately informed Cumbre of the “charges” against it. Cumbre submitted a 56-page binder to SCIF in connection with its appeal, and its appeal was reviewed twice.

There is substantial evidence to support the judgment.

2. The Jury Instructions and Special Verdict Form Pertaining to the Claim for Violation of Fair Procedure Were Correct.

Cumbre argues that the jury instructions and the special verdict form did not correctly state the law as to procedural fairness. We disagree.

We begin by noting that there are no published decisions discussing the propriety of instructions in actions for violation of fair procedure, and there are no patterned jury instructions. None of the published decisions addressing the common law right to fair procedure discuss the issue of whether a party claiming a violation of that right is entitled to a jury trial. We observe that review of fair procedure violations in the medical peer review context is limited to review by way of extraordinary writ petition. (Bus. & Prof. Code, § 809.8.) Writ review has been utilized in other situations where an organization acts as a “gatekeeper” over the right to practice a lawful trade or profession. (See *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 318.) This may be because the logical remedy for an unfair procedure or hearing is a new and fair hearing, or an injunction prohibiting the gatekeeper from enforcing the penalty or exclusion. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1969) 1 Cal.3d 160, 164 (*Pinsker I*).)

a. Reviewing Standards

Assuming there is a right to a jury trial in an action for damages for violation of the right of fair hearing, we apply settled rules governing review. A party is entitled to have the jury instructed as to his theory of the case provided (1) that he requests and submits legally correct instructions, and (2) that there is sufficient evidence to support the theory. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 547.) When it is argued that a jury has been erroneously instructed, we examine all the circumstances of the case including a review of all the evidence, as well as the instructions as a whole. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72.) We review the court's alleged error in instructing the jury de novo. (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 164.) The standard of review for a special verdict is also de novo. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707.)

b. Discussion

As Cumbre correctly points out, the doctrine of fair procedure has two requirements or elements: (1) the decision making process must be substantively rational; and (2) the decision making must be procedurally fair. (*Potvin v. Metropolitan Life Ins. Co., supra*, 22 Cal.4th at p. 1072.) The instructions given by the court, while worded slightly differently from Cumbre's requested instruction, correctly instructed the jury on those elements.

The instruction on fair procedure requested by Cumbre stated: "Cumbre claims that SCIF owed a duty to afford it fair procedure in connection with its termination of Cumbre's broker arrangements and that SCIF breached that duty. [¶] When the doctrine

of fair procedure applies, the insurer's decision making must be both substantively rational and procedurally fair. [¶] The duty of fair procedure applies where an insurer provides services affecting the public interest; has superior bargaining power; and makes a decision that infringes on a substantial economic interest. [¶] To establish that SCIF had a duty to afford plaintiffs fair procedure, Cumbre must prove by a preponderance of the evidence that SCIF's termination of its broker relationships with Cumbre had a significant effect on Cumbre's substantial economic interest. [¶] Fair procedure does not require any specific procedure that must always be followed. It does not require formal proceedings with all the embellishments of a court trial, nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. However, the process used must be procedurally fair, and the decision made must be substantively rational. [¶] . . . [¶]"

The instruction read to the jury stated: "Cumbre contends that State Fund owed Cumbre a duty of fair procedure. In order to establish that State Fund owed Cumbre a duty of fair procedure, Cumbre must prove that the termination of Cumbre's broker status had a significant effect on Cumbre's substantial economic interest. [¶] If you determine that State Fund did owe Cumbre a duty of fair procedure when it terminated Cumbre's broker status, you must next consider whether State Fund fulfilled its duty. In order to demonstrate that State Fund did not satisfy the duty of fair procedure, Cumbre must prove: [¶] 1. That State Fund's creation of its broker termination program was not substantively rational, or [¶] 2. That State Fund failed to provide Cumbre with adequate notice of the reasons for termination and a reasonable opportunity to respond. [¶] A

decision is substantively rational when it is not arbitrary, discriminatory, or otherwise without any rational basis at the time the decision was made. [¶] To meet its duty of fair procedure, should you find such a duty applies, SCIF must have provided Cumbre with notice of the reasons for SCIF's decision and an opportunity to be heard. [¶] The opportunity to be heard does not require an in-person hearing, nor must it include an independent decision-maker, or any of the formalities of a full-blown judicial proceeding. [¶] It is for you to determine whether SCIF provided such fair procedure to Cumbre."

Cumbre complains that (1) the instruction did not mention a duty to be fair; (2) "notice of the reasons for SCIF's decision" is not a sufficient statement of the duty to give notice of the charges against Cumbre; and (3) an "opportunity to be heard" is not a sufficient statement of the requirement that Cumbre have a reasonable opportunity to respond to the charges against it. The language of the instruction speaks for itself and covers the elements Cumbre claims are missing.

The instruction given specifically instructed the jury on the first element, that if SCIF owed a duty of fair procedure, Cumbre must establish the elements of fair procedure; that it was not substantively rational, or that it failed to provide adequate notice of the reasons for termination and opportunity to respond. SCIF must have provided Cumbre with both notice of the reasons for the decision *and* an opportunity to be heard. The opportunity to be heard necessarily includes the opportunity to respond, since one cannot be heard unless one responds.

As to the special verdict form, we conclude it correctly addressed the issues the jury had to decide. Absent any authority to the contrary, we conclude there was no error in the instructions or special verdict.

3. There Was No Error In Admitting Testimony That Cumbre's Appeal Would Have Been Denied Even Without a Computational Error.

On redirect, Cumbre objected to a question asked of Tom Clark, a member of the executive committee for SCIF, whether it would have made a difference in deciding Cumbre's appeal if errors were made in computing the loss ratio. Cumbre's objection that the question called for speculation was sustained insofar as it did not ask the witness what his own response might have been. The question was rephrased and no additional objections were made. Clark testified that it would not have made any difference because the amount of Cumbre's book of business that would have to be excluded to reach an acceptable loss ratio was too large a portion of its business.

Later, James Treadwell, the senior preferred broker representative for SCIF, was asked a similar question about revisions to the calculation of Cumbre's profitability. On this occasion, Cumbre objected on the ground the question was ambiguous as to time, and the objection was sustained. This question was rephrased and re-asked without objection. Similar questions were asked of other witnesses without objection. Cumbre argues the court erroneously admitted the testimony of the witnesses. We disagree.

We review evidentiary rulings for an abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) A party may not appeal from a judgment or order made in his favor. (Code Civ. Proc., § 902; *County of Alameda v. Carleson* (1971)

5 Cal.3d 730, 736; *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026-1027.) Here, Cumbre objected twice to questions asked of SCIF witnesses on separate grounds, and each of its objections was sustained. These favorable rulings may not be appealed.

As to those other places in the record where witnesses testified that the decision to deny Cumbre's appeal would not have been affected by awareness of a minor computational mistake, no further objections were made or noted. Any other error in the admission of the challenged testimony was forfeited. (Evid. Code, § 353; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1260-1261.) Even if an objection had been preserved for review on appeal, we cannot say any error was prejudicial. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 372.)

4. The Trial Court Properly Admitted Evidence of SCIF's Reinstatement Offer.

Cumbre argues that the trial court erred in admitting evidence of SCIF's reinstatement offer over its objection. Specifically, Cumbre asserts that evidence of an offer that would require surrender of valuable rights is inadmissible. We disagree.

In civil actions, the right to recover damages is qualified by the doctrine of avoidable consequences. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.) Under this doctrine, which is recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured party could have avoided by reasonable effort or expenditure. (*Id.* at p. 1043.) This is commonly referred to as a party's duty to mitigate damages. (*Ibid.*) A plaintiff

cannot recover for losses which by reasonable means it could have avoided. (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 649.) However, the duty to minimize damages does not require an injured person to do what is unreasonable or impracticable (*Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23), and the rule has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights. (*Seaboard Music Co. v. Germano* (1972) 24 Cal.App.3d 618, 623.)

The burden of proving that the injured party failed to minimize damages incurred is on the party challenging the injured party's right to recover them. (*Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 816-817.) To meet that burden, SCIF proffered evidence that all terminated brokers were offered reinstatement. While Cumbre was permitted to argue that the requirement that it dismiss any pending litigation required it to surrender an important and valuable right, nothing in *Seaboard, supra*, or in *Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, permits exclusion of such evidence. To the contrary, in each case relied upon by Cumbre, the mitigation evidence was admitted and the issue was whether the evidence supported the findings regarding whether the respective defendants met their burden.

There was no abuse of discretion in admitting the evidence.

5. Our Prior Opinion, Holding Only That There Were Triable Issues of Fact as to the Fair Procedure and Unfair Competition Causes of Action, Was Not Law of the Case on the Merits of Those Claims.

In limine, Cumbre sought a ruling excluding defense evidence regarding SCIF's power to terminate the broker contract on the ground of law of the case. According to

Cumbre’s interpretation of our opinion, if Cumbre could show it was substantially impacted economically by the termination, fair procedure applies, and, if fair procedure applies, SCIF could not simply terminate Cumbre because the contract has a termination provision. In response, SCIF argued that since there were only five months left in the 2003 brokerage contract, and since the contract provided that it could be terminated at will at any time, SCIF should be permitted to show there was no substantial economic impact. The trial court declined to exclude the evidence. Cumbre now argues that the trial court erred in admitting testimony that contradicted our previous opinion in *Cumbre, Inc. v. State Compensation Insurance Fund*, *supra*, E040219. We disagree.

The doctrine of the law of the case is this: Where an appellate court states a rule of law necessary to its decision, such rule must be adhered to in any subsequent appeal in the same case. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893.) However, intermediate determinations, such as rulings on motions and interlocutory orders, are not conclusive. (*Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1523, fn. 2.) Further, where the legal principle to be applied was not a ground of the prior decision, the law of the case doctrine is inapplicable. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 492.)

Our prior decision was not an opinion on the merits of Cumbre’s claim that its right of fair procedure was violated by the broker termination program. Our decision held only that summary judgment was not proper, as there were “triable issues of material fact as to whether the rule applied under the circumstances in this case and, if so, whether State Fund failed to provide a fair procedure in deciding to terminate the agreement in considering Cumbre’s appeal from that decision.” (*Cumbre, Inc. v. State Compensation*

*Insurance Fund, supra*, E040219 at p. 3.) In explaining our decision, we observed that, “Once a plaintiff establishes the threshold elements, he *may* present his case that the defendant’s decision violated his right to fair procedure. But the question of whether a violation occurred in this case also cannot be determined as a matter of law.” (*Cumbre, Inc. v. State Compensation Insurance Fund, supra*, E040219 at p. 29 [italics added].) We went on to state that, “Factual questions remain as to whether State Fund’s appeals process in this case comported with these minimum requirements.” (*Id.* at p. 35.)

Factual questions are matters for the trier of fact. (Evid. Code, § 312.) We did not hold, as a matter of law, that SCIF violated Cumbre’s right of fair procedure, or that evidence of the terms of the broker contract were inadmissible. The question of whether fair procedure was violated and whether SCIF engaged in unfair competition were questions for the jury, as trier of fact, and not a question of law for which the doctrine of law of the case would apply. The admission of the terms of the broker agreement was proper.

6. Because the Verdict Is Correct, Cumbre Is Not Entitled to Restitution In Any Amount.

Having determined that there is substantial evidence to support the jury’s verdict, Cumbre was not entitled to restitution.

DISPOSITION

The judgment is affirmed. SCIF is entitled to costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

s/Ramirez  
P.J.

We concur:

s/McKinster  
J.

s/Richli  
J.